No. 12,509

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS HAYES, *et al.*, on Behalf of Himself and All Others Similarly Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Appellees.

BRIEF FOR APPELLEE UNION PACIFIC RAILROAD COMPANY.

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TOPICAL INDEX

STATUTES

TEXTBOOKS

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Jurisdictional Statement.

One of the grounds upon which the District Court dismissed the action was that the Court lacked jurisdiction of the subject matter of the action since it was not a civil action arising under an act of Congress regulating commerce, 28 U. S. C., par. 1337, which was the only basis for jurisdiction asserted by Appellant. The District Court's judgment should be affirmed on that ground and for other reasons hereafter stated. It is conceded that this Court has jurisdiction of the appeal under 28 U. S. C., par. 1291.

Statement of the Case.

(A) Motions Involved.

On motion of the Appellees the District Court dismissed the original complaint for lack of jurisdiction and also for failure to state a claim upon which relief could be granted. In passing upon the latter ground the Court considered the affidavits presented by all parties and determined that there was no genuine issue as to any material fact. Under Rule 12(b) of Rules of Civil Procedure the judgment on this ground was a summary judgment for the Appellees. The motion of this Appellee to dismiss the original complaint was also on the additional ground that there was an administrative remedy under the Railway Labor Act available to Appellant which had not been availed of. The District Court did not pass upon this ground which nevertheless supports its judgment. The District Court also denied Appellant's motion for leave to file an amended complaint. This appeal concerns the correctness of the action taken by the District Court on the foregoing motions.

(B) Factual Background.

The material facts disclosed by the affidavits considered by the District Court are as follows:

The Appellee Union Pacific Railroad Company (hereinafter called "Railroad") is a common carrier by railroad subject to the Railway Labor Act. Appellee Dining Car Employees Union Local 372 (hereinafter called "Union") is the collective bargaining agent for the kitchen employees (hereinafter called "cooks craft") on the dining, cafe-lounge and other similar cars operated by Railroad. The Railroad and Union entered into an agreement dated June

1, 1942 (hereinafter called "agreement") governing the wages and working conditions of the cook's craft. The pertinent provisions of the agreement are set forth in the affidavit of H. I. Norris [Tr. 43-59]. The agreement provides for the four following separate seniority groups in each of which seniority is acquired with respect to a particular type of dining car service:

Group AA—Selective Runs (streamliner trains)

Group A —Standard Dining Car Runs

Group B —Challenger Runs

Group C —Cafe-lounge Car and similar runs.

The different seniority groups reflect the varying types of dining car service offered on the different classes of trains operated by Railroad. The most complicated menus and luxurious service which require employees of the highest skill, are offered on the Streamliner trains (Group AA) and the simplest menus and service which require employees of the least skill, are offered on cafe-lounge and similar cars (Group C).

With the exception hereinafter noted, the agreement provides for the following separate seniority classes within each seniority group, each seniority class including employees of different skill and experience from those in another class.

1. Chef-caterers
2. Chefs
3. Second Cooks and Coach Buffet Cooks
4. Third Cooks, Dish-up Men and Cafe Car Cooks
5. Fourth Cooks and Coach Buffet Cook's Helpers.

The skill and experience required in each class varies downward from the Chef-caterers class which class was established by the agreement only in seniority Group AA.

The rates of pay vary in each seniority group and class, the highest rates being paid in Group AA and in the Chef-caterer class.

The agreement provides the following rules relating to seniority and promotion. An employment relationship is established by 90 days continuous service in the cook's craft. Seniority is acquired in the group and class in which service is being rendered when an employment relationship is established. Seniority when acquired in a particular group and class also applies in all lower groups and classes. Seniority in a higher group or class is only acquired by being assigned to a non-temporary position and performing actual service therein. Service in temporary positions, which are available only temporarily because of sickness, leaves of absence, etc., of employees regularly assigned thereto, does not create seniority in the group and class in which temporary service is performed. All non-temporary positions are filled pursuant to bulletin issued by Railroad inviting all employees in cook's craft to apply or "bid." All employees desiring to be considered must submit written applications or "bids" within 10 days from date of bulletin, and assignment is made within 20 days from the same date. Employees are promoted on the basis of seniority, fitness and ability and except as to positions in Group AA, seniority governs promotions where fitness and ability are sufficient.

There is no provision in the agreement obligating Railroad to assign a new employee to any particular group or class, subject, of course, to the obligation to apply the

promotion rules where an existing employee of equal fitness and ability applies for a position available to new employees. All provisions of the agreement apply uniformly and without distinction to colored and white persons.

In practice new employees regardless of whether they are colored or white, are generally first employed in the inferior groups and classes.

Information concerning the manner in which the agreement has been applied by Railroad is contained in three affidavits of H. A. Hansen [Tr. 21-24; 80-99; 111-135] as well as in the Norris affidavit 946 persons (of which 363 are white and 583 are colored) have held an employment relationship in the cook's craft with Railroad at some time during the four-year period prior to the filing of the complaint. Some of these were first employed during said period and some prior thereto. At the time of the first employment of these persons, they were employed and first established seniority in the following groups and classes [Tr. 82]:

White Group	Class	No.	Negro Group	Class	No.
AA	3 (Second Cooks)	2	AA	5 (Fourth Cooks)	10
AA	4 (Third Cooks)	9	A	2 (Chefs)	2
AA	5 (Fourth Cooks)	56	A	3 (Second Cooks)	13
A	2 (Chefs)	7	A	4 (Third Cooks)	39
A	3 (Second Cooks)	46	A	5 (Fourth Cooks)	254
A	4 (Third Cooks)	36	B	2 (Chefs)	4
A	5 (Fourth Cooks)	189	B	3 (Second Cooks)	27
B	4 (Third Cooks)	3	B	4 (Third Cooks)	64
B	5 (Fourth Cooks)	15	B	5 (Fourth Cooks)	165
		—	C	2 (Chefs)	1
		363	C	4 (Third Cooks)	4
					—
					583

The names and dates of original hiring of each of the colored employees listed in the above tabulation is set forth

in affidavit of H. A. Hansen notarized November 12, 1949 [Tr. 111-135]. Both colored and white persons have been promoted under the agreement strictly in accordance with the seniority and promotion rules and without distinction on account of race. As a result, substantial numbers of negroes held seniority in all groups and classes as of July 6, 1949, the date upon which the original complaint was filed in this case. Of 507 cooks holding seniority in the two highest seniority groups at that time, 319 were colored and 188 were white segregated as follows [Tr. 23]:

Cooks Holding Group AA and Group A Seniority as of July 6, 1949

Chef-Caterers—Chefs		2nd Cooks		3rd Cooks		4th Cooks	
White	Colored	White	Colored	White	Colored	White	Colored
41	16	37	31	21	18	13	19

Cooks Holding Group A but not Group AA Seniority as of July 6, 1949

	Chefs		2nd Cooks		3rd Cooks		4th Cooks	
	White	Colored	White	Colored	White	Colored	White	Colored
	37	61	19	53	11	56	9	65
Grand Total	78	77	56	84	32	74	22	84

Total:
White 188
Colored 319

Appellant Hayes has seized upon the changes in service resulting from the discontinuance of all Challenger type trains and Group B dining car service by Railroad in 1947 to promote litigation with the Union and Railroad on the false charge of racial discrimination. Challenger trains providing sleeper service at less than standard fares and dining car service with adequate but simple menus at greatly reduced prices were initiated by Railroad in 1935. Many cooks who worked on these trains chose to

remain in Group B Seniority service although there were numerous occasions after the date of the agreement when assignments on standard dining cars carrying Group A seniority were available for bid to Group B personnel. The work in Group B service was less burdensome than in Group A service and the wage differential less than $10.00 a month in favor of Group A. During the year 1947 all Challenger service was discontinued with the result that cooks holding Group B seniority could only exercise seniority rights in Group C and await an opportunity to establish a seniority date in Group A when positions become available. This obvious misfortune was suffered by white as well as colored cooks [Tr. 54-59].

On January 1, 1947, prior to the discontinuance of any of the Challenger trains, the following number of employees held seniority in the cook's craft in Groups A and B:

	Group A	Group B	Total
White	110	31	141
Colored	259	87	346

On January 1, 1948, subsequent to the discontinuance of all Challenger trains, the following number of employees held seniority in the cook's craft in Groups A and B:

	Group A	Group B	Total
White	97	12	109
Colored	250	49	299

[Tr. 57].

The result was that Appellant Hayes on behalf of some of the colored cooks holding Group B seniority made demand that Group B seniority dates be made applicable in Group A. In letter from Appellant Hayes to the General Chairman of the Union dated February 14, 1948, it was stated:

> "We are demanding the following:
>
> "(1) A complete elimination of all classes, AA, A, B and C because they have been used as a media to segregate and exploit the Colored cooks and to take from them the seniority which they have accumulated with the Union Pacific by their own labor.
>
> "(2) That all cooks, regardless of Race, Color, Creed or National Origin, may exercise their seniority over any employee their junior on any train on the Union Pacific Railroad." [Tr. 85.]

Such action would have adversely affected employees, both colored and white, holding seniority in Group A and would have violated the seniority provisions of the agreement. The Union which represents and admits to membership both colored and white employees has not asked Railroad to change the seniority provision of the agreement to carry out the desires of the group represented by Appellant Hayes.

(C) Issues Involved.

The complaint was filed July 6, 1949 by Appellant Hayes, a negro, who purported to sue on behalf of 87 other negroes listed on Exhibit A, who are alleged to

be employees or former employees of Railroad. Appellant and such persons are hereafter called "plaintiffs." At the time the complaint was filed, Hayes and 71 of the 76 plaintiffs whom Railroad could identify as being then employed in the cook's craft had acquired a seniority date in Group A [Tr. 97]. The complaint charged Railroad with commission of the following wrongful acts:

(1) The assignment of plaintiffs to inferior groups and classes (Group B and Class 3—Second cooks) while assigning white persons when first employed to higher seniority groups and classes (Group A, and Class 1 or Class 2).

(2) Refusal to accept bids of plaintiffs for bulletined positions in higher groups and classes (Group A, and Class 1 or Class 2) while assigning white employees to such positions.

(3) Employment of plaintiffs in higher seniority groups and classes (Group A, and Class 1 or Class 2) without according them seniority therein.

(4) Denial of promotion of plaintiffs to higher seniority groups and classes without criticism of their fitness and ability because they were negroes and for the purpose of oppressing them.

The charge against the Union was that the above acts were done by Railroad with Union's "connivance" [Tr. 2-17].

The Appellant's position is not entirely clear, but we now understand that Appellant has either expressly or

tacitly abandoned all of the allegations above noted except the first (Brief for Appellants, p. 12).

After the District Court had rendered its opinion upon the motions to dismiss the complaint and had ordered it dismissed, Appellant Hayes and a group of negroes consisting of substantially the same persons who are named in Exhibit A to the complaint moved for leave to file an amended complaint [Tr. 144]. Both causes of action in the proposed amended complaint were substantially the same as the original complaint except that the second cause of action alleged that when the agreement was entered into Union and Railroad had a verbal understanding, modifying the agreement, that the Railroad would assign negroes to lower seniority groups and classes (Group B and Classes 4 and 5) when first employed, whereas white persons would be assigned to higher seniority groups and classes (Group A and Classes 2 and 3) when first employed [Tr. 145-161]. The sole issue with respect to the proposed amended complaint is whether the District Court abused its discretion in denying leave to file it.

Summary of Argument.

I.

One of the principal grounds supporting the judgment of the District Court dismissing the complaint against the Railroad is that the Court did not have jurisdiction of the subject matter of the action. The sole ground of jurisdiction asserted by plaintiffs is that the action arose under a federal law regulating interstate commerce. In so far as the complaint charged the Railroad with failure to promote or accord plaintiffs seniority rights in accordance with the collective bargaining agreement, it was an action on contract and not one arising under federal law and hence not within the jurisdiction of the District Court.

II.

The complaint charged the Railroad with discrimination against the plaintiffs in assigning them to inferior seniority groups and classes at the time when first employed. It failed to state a cause of action arising under federal law because the Railway Labor Act does not either expressly or impliedly prohibit a railroad from discriminating against persons by reason of their race in employment.

III.

The allegation that Railroad committed the acts charged with the "connivance" of the Union is a charge that they were committed with the acquiescence of the Union. Thus the complaint charged the Railroad and Union with separate and distinct acts—the Railroad with the commission of certain wrongs and the Union with omitting to take counter measures to prevent the wrongs committed by Railroad. If this gave rise to a cause of action against

the Union cognizable by the District Court as one involving a federal question, the jurisdiction of the cause of action against the Union did not permit the Court to assume jurisdiction of the separate and distinct non-federal action against Railroad.

IV.

When the jurisdiction of a federal Court is placed in issue, the Court is not bound by the facts pleaded but may determine the true facts. The District Court did this by resorting to the affidavits filed by the parties. The evidence contained in the affidavits of the Railroad and Union which is not disputed by any competent evidence produced by Appellant, conclusively establishes that Railroad did not discriminate against the plaintiffs or other negroes in hiring or in application of the seniority and promotion rules of the agreement. This demonstrated that there was no federal question involved which would give the Court jurisdiction.

V.

The judgment of dismissal of the District Court was a dismissal on the merits as well as for lack of jurisdiction. The Appellees moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. The Court considered the affidavits of the parties in considering the motions. Under Rule 12(b) the motions were treated as motions for summary judgment. The Court's finding that there was no issue as to any material fact is proper because the Appellant did not present competent evidence contradicting the material facts contained in the affidavits of Union and Railroad. Statements in affidavits which are based on hearsay or which are other-

wise incompetent do not create an issue as to a material fact which prevents the entry of a summary judgment. The undisputed facts in the affidavits of Railroad and Union that no discrimination had been practiced by either Appellee justified the District Court in rendering a judgment as a matter of law for the Appellees.

VI.

The judgment of dismissal is also proper because the plaintiffs have an adequate administration remedy which they must pursue to the exclusion of a Court action. The plaintiffs seek a judgment which will fix future seniority rights under the collective bargaining agreement. The United States Supreme Court has recently held in *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239, that such a cause of action is exclusively within the jurisdiction of the Railroad Adjustment Board.

VII.

The order of the Court refusing to allow Appellant to file an amended complaint was proper. Such a motion is addressed to the discretion of the Court and the Court did not abuse its discretion. The only new allegation contained in the amended complaint is the allegation contained in the second cause of action that the Railroad discriminated against the plaintiffs by assigning them to inferior seniority groups and classes when first hired pursuant to a verbal agreement between Railroad and Union made when the collective bargaining agreement was made. On a motion to file an amended complaint the Court can consider facts other than those pleaded. The undisputed facts appearing in the affidavits considered by the Court show that Railroad has not discriminated be-

tween white persons and negroes in assignment of new employees to seniority groups and classes. The facts stated in the amended complaint are not true and are a fraud on the Court.

VIII.

The Court did not abuse its discretion in refusing Appellant permission to file the amended complaint because it does not state a cause of action against Railroad under the Railway Labor Act for two reasons.

First, the amended complaint merely alleges that the plaintiffs were assigned to inferior groups and classes when first hired. It does not allege that all negroes when first hired as cooks were assigned to inferior groups and classes. The plaintiffs are only some of the negroes who have been employed by Railroad. The facts in the affidavits show that many negroes when first hired were assigned to higher seniority groups and classes. Racial discrimination does not exist if some negroes are hired in inferior groups and others are hired in higher groups and classes.

Second, the right of the Railroad under the Railway Labor Act to discriminate against negroes in the matter of hiring is not extinguished because such right is recognized by the collective bargaining agent in an agreement. The freedom in hiring enjoyed by the Railroad under the Act cannot be made to depend on whether the collective bargaining agent approves or disapproves of the actions of the Railroad. Anything which the Railroad has the power to do alone it has the power to do even though the Union agrees to it. In the *Tunstall* case the Railroad and Union did something which neither

could do alone—destroy pre-existing seniority rights. The Court held that such action by the Union was invalid under the Act and hence the Railroad could not be bound by or enforce an agreement which the other party was prohibited from making. The case did not hold that the Railroad had violated the Act by making the agreement. Neither is such an agreement as is here alleged, a violation of the obligations of the Union under the Railway Labor Act. The agreement does not deprive any person of existing seniority rights as in the *Tunstall* case. If the Union made such an agreement, it merely recognized the right of the Railroad under the Act to hire such persons as it wished to and to classify them in such work categories as it thought desirable. Under the collective bargaining agreement, the employees so hired and classified by the Railroad were entitled to equal rights of seniority and promotion. The situation alleged in the amended complaint is no different from that in the *Tunstall* case with respect to the practice of the railroad there involved, undoubtedly recognized by the Union in the collective bargaining agreement, not to promote negro firemen to engineer status.

IX.

The relief sought in this case, both in the original and in the proposed amended complaint, shows that Appellant seeks the complete abolition of the separate seniority groups and classes provided by the agreement rather than the abolition of the alleged oral agreement between Union and Railroad. This the Court cannot do because it has no power to write a new contract for the parties.

ARGUMENT.

I.

An Action for Breach of Contract Does Not Present a Federal Question.

The Appellant has now apparently abandoned all charges against the Railroad set forth in the complaint except the allegation that at the time of their first employment the Railroad assigned plaintiffs to inferior seniority groups and classes while assigning white persons when first employed to higher seniority groups and classes. However, the complaint contains the allegations heretofore noted concerning the failure of the Railroad to promote the plaintiffs as required by the agreement. We will discuss these allegations so that our position will be clear in case we have misunderstood the position of the Appellant.

A controversy concerning the question of whether a collective bargaining agreement has been violated by the Railroad employer is not a controversy arising under the Railway Labor Act. The right of the plaintiffs in such a case is founded upon a contractual obligation and not upon any provision of the Railway Labor Act. The determination of such controversy can involve only a construction of the agreement and a determination of the factual question of whether the defendant Railroad has violated the provisions of the agreement. The determination of such controversy will not turn upon the construction of any provision of the Railway Labor Act and therefore, the controversy cannot be one arising under the laws of the United States. The Railway Labor Act does not compel the making of collective bargaining agreements. It encourages the making of such agreements by requiring collective bargaining and by freeing the collective bar-

gaining agent of the employees from employer domination. But the rights acquired by employees under a collective bargaining agreement voluntarily negotiated are not rights which arise under the Railway Labor Act. Instead, they are mere contractual rights which arise under the usual rules of contract.

The Courts have almost without exception held that an action upon a contract or for breach thereof, even though the contract is made pursuant to a federal statute, is not an action arising under the laws of United States. This is the holding of the leading case on the subject—*Gully v. First National Bank,* 299 U. S. 109. Consistently with the principle announced in this case, the federal Courts have held in a number of cases that suits by railroad employees against railroad employers based upon employment contracts, collective bargaining agreements, or contracts implied from long custom and practice, are not suits arising under the laws of the United States and that on that ground the federal Courts do not have jurisdiction of the subject matter of such suits.

Starke v. N. Y. C. & St. Louis R. R. (7th C. C. A.), 17 Labor Cases, par. 65,629;

Strawser v. Reading Co. (D. C., E. D., Penn.), 80 Fed. Supp. 455;

Malone v. Gardner (4th C. C. A.), 62 F. 2d 15;

Barnhardt v. Western Maryland Ry. Co. (4th C. C. A.), 128 F. 2d 709, cert. den. 317 U. S. 671, 87 L. Ed. 538;

Burke v. Union Pacific Railroad Co. (10th C. C. A.), 129 F. 2d 844;

Shipley v. Pittsburgh & L. E. R. Co. (D. C., W. D., Penn.), 70 Fed. Supp. 870;

Parrish v. Chesapeake & O. Ry. Co. (4th C. C. A.), 62 F. 2d 20, cert. den. 288 U. S. 604.

II.

Railway Labor Act Does Not Prohibit Racial Discrimination by Railroads.

In order for a District Court to have jurisdiction on the ground that the suit is one arising under a federal law regulating commerce, there must exist a genuine and present controversy with respect to the construction or effect of such a law, so that the rights claimed will be supported if the law is given one construction or effect and defeated if it receives another. If such a problem of construction is not involved or if the claim is obviously without merit, the action is not one arising under federal law and the District Court is without jurisdiction on that ground.

Gully v. First National Bank, 299 U. S. 109;

California Water Service v. Redding, 304 U. S. 252;

Williams v. Miller, 48 Fed. Supp. 277, affirmed 317 U. S. 599.

The claim of Appellant is that Railroad has discriminated against the plaintiffs by assigning them to inferior seniority groups and classes at the time of first employment, whereas white persons have been assigned to higher seniority groups and classes at the time of first employment. Railroad denies that this is a fact but we will discuss the allegation first on the assumption that it is true. Even though true, such action on the part of the Railroad clearly would not violate the provisions of the Railway Labor Act. Accordingly, no substantial federal ques-

tion exists upon which jurisdiction of the District Court can be founded.

The Railway Labor Act is not a Fair Employment Practices Act. It does not expressly or impliedly enjoin on a railroad any obligation with respect to the employment of negroes or their treatment after being employed. Neither does it undertake governmental regulation of wages, hours or working conditions nor interfere with the normal right of an employer to select its employees or discharge them, so long as the employer does not impair the collective bargaining process. The Act deals exclusively with the encouragement of collective bargaining, the mediation of labor disputes and the settlement of grievances under collective bargaining agreements.

Terminal R. R. Assn. v. Brotherhood of R. R. Trainmen, 318 U. S. 1 at page 6, 87 L. Ed. 571;

Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 584, 74 L. Ed. 1034;

Virginia Ry. Co. v. System Federation, 300 U. S. 515, 81 L. Ed. 789 at page 806;

Beeler v. Chicago R. I. & P. Ry. Co., 169 F. 2d 557;

Switchmen's Union of N A. v. National Mediation Board, 320 U. S. 297, 88 L. Ed. 61;

General Committee B. L. E. v. Southern P. Co., 320 U. S. 338, 88 L. Ed. 85;

General Committee B. L. E. v. M. K. T. R. Co., 320 U. S. 323, 88 L. Ed. 76.

The case of *Tunstall v. B of L F & E,* 323 U. S. 210, 89 L. Ed. 187, and its companion case, *Steele v. L & N R Co.,* 323 U. S. 192, 89 L. Ed. 173, do not change the law announced in the foregoing decisions. The latter cases do not hold that the Railway Labor Act, either expressly or impliedly, prohibits a railroad from discriminating against negroes either at the time of first employment or in their treatment thereafter. The cases do hold that there is an implied obligation on the part of the collective bargaining agent of the employees of a railroad, derived from its power to exclusively bargain for such employees, not to discriminate against any employee represented by such bargaining agent by reason of the race of such employee. In these cases the railroads involved had been coerced by the collective bargaining agent into making an agreement which deprived negro firemen of seniority rights which they had previously acquired under previous collective bargaining agreements. The railroads as well as the collective bargaining agent were parties to the actions. The *Steele* case held that the railroad there involved was not bound by or entitled to take the benefit of a contract which the bargaining representative was prohibited by a statute from making. This holding is sound contractual law. Neither of the cases, however, is authority for the proposition that the Railway Labor Act imposes any obligation on a railroad to refrain from racial discrimination in employment practices. In the *Tunstall* case, the railroad concerned indulged in a type of racial discrimination which the Court

did not enjoin and which we submit, it had no power to enjoin. The facts appear in the decisions of the District Court and Circuit Court of Appeals who considered the case on the merits after the Supreme Court had passed on the jurisdictional question. (See *Tunstall v. B of L F & E,* 69 F. Supp. 826, affirmed 163 F. 2d 289, cert. den. 332 U. S. 841.) It appeared in these decisions that the railroad involved had a fixed practice not to promote negro firemen to the status of engineers. The collective bargaining agreements designated negro firemen as "non-promotable" and white firemen as "promotable." The seniority which the negro firemen owned had been acquired under these agreements. It is thus evident that the collective bargaining agent had assented to a discriminatory practice of the railroad. But the Court did not enjoin this agreement nor the discriminatory practice of non-promotability of negro firemen. The Court did enjoin later agreements which sought to deprive the negro firemen of their seniority as firemen. The effect of the Court's decision was to reinstate the earlier agreements under which the negro firemen held senority rights but which undoubtedly discriminated against them by designating them as non-promotable.

III.

Causes of Action Against Railroad and Union Are Separate and Distinct.

We do not propose to discuss the question of whether the complaint states a cause of action against the Union except to point out that any cause of action which the complaint purports to state against the Union is separate and distinct from the cause of action against the Railroad and that if there is jurisdiction of the cause of action against the Union, this fact does not support the claim of jurisdiction against the Railroad. In the complaint the Railroad is accused of being the active wrong-doer. The only charge against the Union is that the alleged wrongs committed by the Railroad were with the Union's "connivance." The word "connivance" means "intentional failure or forbearance to discover a wrongdoing; voluntary oversight; passive consent or cooperation" and in law "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it." *Webster's International Dictionary;* see also *Brandon v. Holman* (C. C. A. 4th), 41 F. 2d 586.

In short, the only charge against the defendant Union is that it has sat by and done nothing about the Railroad's allegedly wrongful conduct.

If any cause of action is stated against the Railroad, it is because of the act of the Railroad in assigning employees to inferior seniority groups and classes when first

employed or in failing to live up to the terms of the agreement in the matter of promotion. The Union is merely charged with failure to take some counter move to prevent the action of the Railroad.

The acts charged against each defendant are not joint or common but are separate and distinct. Jurisdiction over a claim against one defendant by virtue of a federal matter will not support jurisdiction over a separate claim against another defendant.

3 *Moore's Federal Practice* 2d 2725;

Pearce v. Penn. R. Co. (3rd C. C. A. 1927), 162 F. 2d 524;

Wasserman v. Perugini (2d C. C. A. 1949), 173 F. 2d 305;

Bullock v. U. S. (D. C. D. N. J. 1947), 72 F. Supp. 445;

New Orleans Public Belt R. Co. v. Wallace (5th C. C. A. 1949), 173 F. 2d 145;

Sheaf v. Minn. S. L. R. Co., 162 F. 2d 110;

Musher Foundation v. Alba Trading Co. (2d C. C. A. 1942), 127 F. 2d 9, certiorari denied 317 U. S. 642, 87 L. Ed. 517;

Norris v. Mayor of Baltimore (D. C. D. Md., 1948), 78 F. Supp. 451.

IV.

Facts Disclosed by Affidavits Show Court Is Without Jurisdiction.

In stressing the point that the Railroad Labor Act does not prohibit a railroad from discriminating against negroes if it desires, we do not want to be understood to be defending racial discrimination. We are merely stating the law as it exists. No employer could have a better record of fair treatment of negroes than that of the Railroad in the instant case. The evidence is overwhelming that no discrimination against negroes in the cook's craft has been practiced by Railroad under the agreement or otherwise.

The complete answer to any theory which the Appellant can advance to support the jurisdiction of the District Court is that under the facts there has been no discrimination by the Railroad in assigning negroes to seniority groups and classes when first hired or in the promotion of such persons to higher groups and classes. It is obvious that if no discrimination exists, there is no federal question in the case. This is conceded by Appellant's counsel [Tr. 173-4].

By its motion to dismiss in the District Court, the Railroad put in issue the jurisdiction of the Court. A motion to dismiss for lack of jurisdiction which controverts the jurisdictional averments of the complaint and which is supported by affidavits creating an issue of fact is an appropriate method of challenging the jurisdictional allegations of the complaint. Such a motion does not admit the truth of the allegations in the complaint and requires the Court to inquire into the facts determining its jurisdiction before considering the merits of the complaint. If, when such an issue is created, the plaintiff upon whom rests

the burden of proof fails to support his jurisdictional averments by sufficient proof, the case will be dismissed for lack of jurisdiction. When such an issue is made, the trial court is not bound by the pleadings of the parties but may inquire into the facts as they really exist.

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 80 L. Ed. 1135;

K. V. O. S. v. Associated, 299 U. S. 269, 81 L. Ed. 183;

Allen v. Clark (D. C. Calif.), 22 F. Supp. 898;

Spears v. Spears (6th C. C. A. 1947), 162 F. 2d 345;

Schuckman v. Rubenstein (6th C. C. A. 1947), 164 F. 2d 952;

Calhoun v. Lang, 40 F. Supp. 264.

Under Rule 43(e) the District Court can decide such a factual issue presented by a motion on affidavits alone.

Young v. Garrett (8th C. C. A. 1945), 149 F. 2d 223;

Urquhart v. American-La France Foamite Corp., 144 F. 2d 542, cert. den. 323 U. S. 783, 89 L. Ed. 625;

American Ins. Co. v. Bradley Mining Co. (D. C. Calif. 1944), 57 F. Supp. 545.

Under this rule there is no reason why a Court may not determine the credibility to be given conflicting affidavits the same as when considering oral testimony. Therefore in passing upon a factual dispute affecting jurisdiction, the Court is not bound by the limitation applying on motions for summary judgment that judgment may not be entered if there is an issue as to a material fact. We

do not think that there was any issue of a material fact raised by the affidavits considered by the District Court. If there was such an issue material to the jurisdictional question, it was resolved by the judgment in favor of the Appellees.

Even if the District Court had not resolved the factual issue material to the jurisdictional question, this Circuit Court of Appeals can determine the issue from the affidavits in the record if such an issue exists. The jurisdictional question can be determined at any stage of the proceedings, and the authority of an Appellate Court to determine jurisdiction, and all factual questions pertinent thereto which can be determined from the record before it, is not less broad than that of the trial court.

The affidavits filed by the Railroad, which are uncontradicted as to material matters by any competent evidence contained in the affidavits filed by Appellant, show overwhelmingly that Railroad has not alone, or in connivance with the Union, discriminated against negroes in favor of white persons either at the time of original hiring or in the matter of promotion thereafter. The affidavits filed by the Railroad were made by H. A. Hansen, Manager, H. I. Norris, Assistant Manager, and J. Hansink, Superintendent of the Dining Car and Hotel Department of Railroad—men who were the chief executive officers of that department, who were shown to have personal knowledge of the facts stated in their affidavits, and who had available to them the employment records of all persons who have worked in the cook's craft for Railroad [Tr. 17, 43, 80, 110, 111]. It was necessary for Railroad to file a succession of affidavits to clearly controvert the many reckless statements and denials contained in the affidavits filed by Appellant. The only affidavits filed by Appellant were

those made by Thomas E. Hayes [Tr. 60, 102]. No affidavits were made by the other plaintiffs or by any of the other numerous negro cooks whose names were listed in the affidavits of Railroad. The affidavits of Thomas E. Hayes are incompetent and should be disregarded because they were made by a person who has not shown himself to have personal knowledge of the employment records of the several hundred white and colored cooks employed by Railroad as to whose employment experience Hayes' statements are pure hearsay. They also contain large quantities of argument and mere denials of factual statements in Railroad's affidavits, which argument and denials have no evidentiary value. His affidavits distort the plain meaning of statements contained in affidavits of Railroad, contain many reckless charges and are patently untrustworthy. Although his affidavits contain repeated accusations that Railroad has refused to promote or allow negroes to bid on jobs in higher seniority groups and classes, and has employed negroes in higher groups and classes for long periods without according them seniority therein, his counsel has now abandoned these false charges and now contends that the discrimination practiced by Railroad is in the assignment of negroes to Group B seniority status at the time they are originally hired. In its affidavits the Railroad has furnished the names and seniority dates of 318 negroes out of 583 who acquired seniority in Group A, or higher, when first hired. This evidence stands uncontradicted.

The claim of discrimination made by Appellant is wholly unsupported factually, and being plainly without merit, does not present a federal question under any view which Appellant has advanced with respect to the obligations of Union and Railroad under the Railway Labor Act.

V.

The Judgment of Dismissal Was Proper Summary Judgment for Appellees.

In the District Court both Appellees moved to dismiss the action because the complaint failed to state a claim upon which relief could be granted. The Court considered the affidavits submitted by Appellant and Appellees and in its judgment of dismissal determined that there was no genuine issue as to any material fact and that the Appellees were entitled to a judgment of dismissal as a matter of law. Under Rule 12(b) where affidavits are considered by the Court upon such a motion, the motion may be treated as one for summary judgment and disposed of as provided in Rule 56. The summary judgment was proper because a consideration of the affidavits of all parties shows that there is no genuine issue as to any material fact. We have already discussed the fact that the affidavits of Thomas E. Hayes are incompetent because on material matters they consist entirely of hearsay, argument and mere denials without evidentiary value. Such affidavits do not create an issue as to material fact which prevents the granting of a summary judgment for Appellees.

Piantadosi v. Loews, Inc. (9th C. C. A.), 137 F. 2d 534 (mere denials);

Boerner v. U. S., 26 F. Supp. 769 (hearsay).

VI.

Railroad Adjustment Board Has Exclusive Jurisdiction of This Controversy.

The Railroad moved to dismiss the complaint on the ground that the Appellant had an administrative remedy under the Railway Labor Act which should be resorted to in lieu of seeking relief in Court.

The District Court did not pass upon this contention but its judgment of dismissal is justified, if for no other reason, by the fact that the Railroad Adjustment Board has exclusive jurisdiction of the type of controversy which is here presented if any justiciable controversy at all is presented. This is a reason which could be urged in support of the judgment even though it had not been urged in the District Court as it was in this case.

Marshall v. Pletz, 317 U. S. 383, 87 L. Ed. 348;

Cold Metal Process v. McLouth Steel Corp., 126 F. 2d 185;

Crummer v. Nuveen, 147 F. 2d 3;

Ross v. Comm. of Int. Revenue, 169 F. 2d 483.

The Appellant Hayes and most of the persons who are listed on Exhibit A attached to the complaint are employees of Railroad. They seek an adjudication which will govern their rights in the future. If Appellant Hayes still relies upon the allegations contained in the complaint that Railroad has failed to accord to the plaintiffs seniority in accordance with the provisions of the Agreement or to promote them to higher groups and classes in accordance

with the provisions thereof, it is obvious that the case will involve an interpretation by the Court of the terms of the agreement in order to determine the obligation assumed by the Railroad under the said agreement. In so far as the complaint charges the Railroad with wrongfully assigning Appellant and such persons to inferior seniority groups and classifications, it is likewise obvious that the complaint seeks a change in the seniority and promotion provisions of the agreement.

One of the principal items of relief prayed for is that the rights of the Appellant and such persons be declared and that an order be made according such persons "such senority dates and such class or classes and group or groups as they would have been entitled to had there been no discrimination against them by defendant." If the Appellant were granted the relief which he seeks, all of such persons would be accorded seniority dates in Group A and the higher classes as of the date each acquired seniority in any class in Group B. This in effect would abolish the distinction made by the collective bargaining agreement between Group B and Group A.

Since the judgment of dismissal in this case the United States Supreme Court had decided the cases of *Slocum v. D. L. & W. R. Co.,* 339 U. S. 239, 94 L. Ed. 534 and *O. R. C. v. Southern Railway Co.,* 94 L. Ed. 542, which definitely hold that the Railroad Adjustment Board has jurisdiction, to the exclusion of a Court, of grievances or other disputes under collective bargaining agreements which involve the future application of such agreements.

These cases clarify the Court's former holding in the case of *Moore v. Ill. Central R. Co.,* 312 U. S. 630. It was held in that case that a discharged railroad employee who accepted a discharge as terminating his employment could sue in Court to recover damages for wrongful discharge. It is plain from the ruling of the Supreme Court in the *Slocum* case that a Court has concurrent jurisdiction with the Railroad Adjustment Board in actions involving collective bargaining agreements only where the controversy, as in the *Moore* case, does not involve the future application of such agreements.

The decision in the *Slocum* case strengthens the holding of the United States Supreme Court in the case of *O. R. C. v. Pitney,* 326 U. S. 561, 90 L. Ed. 318, rehearing denied 327 U. S. 814, 90 L. Ed. 1038, which held that the Railroad Adjustment Board had jurisdiction, to the exclusion of federal courts, of controversies involving the construction of collective bargaining agreement negotiated under the provisions of the Railway Labor Act. Although the *Pitney* case had not clearly distinguished between the rule which it announced and the rule announced in the *Moore* case, it had been followed in the following cases:

Ill. Central R. Co. v. B. of R. T., 83 F. Supp. 930;

M. K. T. v. Randolph, 164 F. 2d 4, cert. den. 334 U. S. 818;

Hampton v. Thompson (5th C. C. A. 1948), 171 F. 2d 535;

Order of RR Telegraphers v. N. O. Tex. & Mex. Ry., 156 F. 2d 1;

Johnson v. War Assets Administration, 171 F. 2d 556.

The *Slocum* and its companion case remove all doubt that the federal courts which have followed the *Pitney* case have been following the proper course.

We are not contending that the *Slocum* case overrules the *Steele* or *Tunstall* cases upon which the Appellant relies. The *Slocum* case does not have application in a situation where the *Steele* and *Tunstall* cases apply, but as we have noted elsewhere in this brief the latter cases have no application here. Courts do have jurisdiction to set aside agreements which are plainly unlawful under the Railway Labor Act. But they do not have jurisdiction to construe them where future application is involved, or to establish under an agreement seniority rights which have never previously existed. This is what the plaintiffs seek. If any justiciable controversy is presented (which we will later see is not the case) it is one exclusively within the jurisdiction of the Railway Adjustment Board.

VII.

The Court Properly Denied Leave to File Amended Complaint Because It Is a Sham.

After the District Court had filed its opinion ordering the complaint to be dismissed but before judgment of dismissal was entered, Appellant Hayes moved for leave to file an amended complaint containing two causes of action, the first of which is substantially the same as the original complaint. The second cause of action in the amended complaint realleged most of the allegations contained in the first cause of action and in addition, alleged in substance that the Railroad and the Union had made a verbal agreement at the time the collective bargaining agreement was entered into, that the Railroad would assign negroes to lower seniority groups and classes at the time of original hiring, whereas, white men would be assigned to higher seniority groups and classes when first hired. No showing in support of the motion to file the amended complaint was made by Appellant except the affidavits which had already been considered by the Court in passing upon the motions to dismiss the original complaint. The District Court denied leave to file the amended complaint.

A motion to file an amended complaint is addressed to the discretion of the trial court and the ruling of the trial court will not be reversed except upon a showing of abuse of discretion.

> *C. E. Stevens Co. v. Foster & Kleiser Co.* (C. C. A. 9th), 109 F. 2d 764, 768-9, reversed on other grounds 311 U. S. 255.

It is not an abuse of discretion on the part of the trial court to refuse to allow an amendment to a pleading where the amendment is not offered in good faith, *Kuris v. Pepper Poultry Co.* (I. D. N. Y.), 2 F. R. D. 361, where the amended pleading is insufficient to state a cause of action, *Beechwood Securities Corporation v. Associated Oil Co.* (9th C. C. A.), 104 F. 2d 537, 540; *Welch v. T. W. Warner Co.* (D. C. S. D. N. Y.), 47 F. 2d 231-2, or where, although the amended complaint states a cause of action on its face, it is subject to summary dismissal under Rule 56 the same as the original complaint.

U. S. ex rel. Brensilber v. Bausch & Lamb Optical Co. (2nd C. C. A.), 131 F. 2d 545.

It is quite apparent that the proposed amended complaint is a sham and was not proposed in good faith. It is an obvious attempt on the part of Appellant Hayes to avoid the consequences of the opinion of the District Court and to stay in Court regardless of the facts which have been established of record. The added material in the proposed amended complaint alleges a verbal understanding between Union and Railroad that Railroad will discriminate against negroes in seniority assignment when first hired for the purpose of attempting to bring the case within the rule of the *Tunstall* and *Steele* cases. This has been done in the face of the uncontradicted evidence already referred to that Railroad has assigned large numbers of negroes seniority status in Group A when first hired and has assigned white men to Group B seniority status when first

hired. The actual results of the employment practices conclusively demonstrate that no such verbal understanding could have been made or followed. In almost all seniority groups and classes negroes are in the majority.

If the present tendency continues negroes will become even more predominant than at present. Both white and negro cooks are generally first hired in the lower groups and classes to fill the vacancies created by the promotion of white and colored cooks. More negro cooks are being hired than white cooks. This is indicated by the relative number of each race found in the lower groups and classes. The inevitable result is that negroes will become increasingly dominant as they are moved into the higher groups and classes where, at present, as already noted, they are in most cases in the majority. These facts which are inescapable plainly indicate that leave to file the amended complaint was properly denied not only on the ground that it is a sham complaint not proposed in good faith, but also because it, like the original complaint, is subject to summary dismissal under Rule 56.

VIII.

Proposed Amended Complaint Did Not State Claim Upon Which Relief Could Be Granted.

As has already been noted, it is not an abuse of discretion to refuse leave to file an amended complaint which does not state a cause of action. The first cause of action in the proposed amended complaint does not contain allegations presenting any problem different from that presented by the original complaint. The second cause of action repeats in substance, with slight variation, the allegations of the original complaint and, in addition, alleges that at the time the written agreement was entered into Union and Railroad had a verbal understanding that Railroad would discriminate against negroes by assigning them to lower seniority groups and classes when first hired, whereas, white men when first hired would be assigned to higher groups and classes. It further alleges that the persons designated as plaintiffs in the proposed amended complaint were, pursuant to this verbal understanding, assigned by Railroad to lower seniority groups and classes than white men when first hired.

The second cause of action fails to state a claim upon which relief can be granted for two reasons. First, because it does not allege that the Railroad has discriminated against all negroes in the assignment of seniority when first employed and second, the right of the Railroad under the Railway Labor Act to assign negroes to any class of service or seniority group when first hired is not changed by reason of the fact that the collective bargaining agent

recognizes this right in the collective bargaining agreement.

The second cause of action merely alleges that the plaintiffs when first hired were assigned by the Railroad, pursuant to the verbal understanding, to lower seniority groups and classes, whereas, white persons when first employed were assigned to higher seniority groups and classes. It does not allege that all negroes when first hired as cooks by Railroad were assigned to lower seniority groups and classes. It could not truthfully so allege because, as heretofore pointed out, the Record herein lists without contradiction the names and dates upon which 318 negroes were assigned to seniority Group A or higher when first employed.

A complaint which fails to allege that a railroad has assigned all negroes hired by it to lower seniority groups and classes when first employed fails to state a cause of racial discrimination. The collective bargaining agreement provides for separate and distinct seniority groups and classes. It cannot be said that discrimination by reason of race exists because a Railroad hires some negroes in a lower group and other negroes in a higher group. It can hardly be contended that a Railroad must hire all negroes in the highest seniority group to avoid a charge of discrimination.

The second reason why the second cause of action fails to state a claim for relief is even more fundamental than the reason just discussed. It is to be noted that, if a verbal understanding was had by Union and Railroad at the time

alleged, the verbal understanding was one which would be unenforceable by the Union against the Railroad for several reasons. It is the policy of the Railway Labor Act as well as the National Labor Relations Act that collective bargaining agreements shall be in writing.

Shipley v. Pittsburgh & L E R Co. (D. C. W. D. Penna. 1949), 83 Fed. Supp. 722, 741 (Railway Labor Act);

O. R. T. v. Railway Express Agency, 321 U. S. 342-9, 88 L. Ed. 788.

The verbal understanding was alleged to have been had when the written agreement was made on June 1, 1942, and to have governed the employment practices of the Railroad since then. Such a verbal agreement is one which by its terms is not to be performed within a year from the making thereof. Therefore it is invalid under the Statute of Frauds and unenforceable against either party thereto.

California Civil Code, Paragraph 1624.

Furthermore, the verbal understanding alleged to have been made would violate the parol evidence rule against permitting the terms of a written contract, complete in itself, to be varied by prior or contemporaneous parol agreements.

Shipley v. Pittsburgh & L E R Co. (D. C. W. D. Penna. 1949), 83 Fed. Supp. 722;

American Sumatra Tobacco Co. v. Willis, 170 F. 2d 215.

Consequently, if a verbal agreement such as that alleged was made, it would be unenforceable against Railroad. Any

action taken thereunder would be a purely voluntary action on the part of the Railroad which it would be entitled to take under the provisions of the Railway Labor Act.

Furthermore, even if the verbal agreement can be said to have binding effect as between the parties, it is not an agreement which would create a violation of the Railway Labor Act by either the Railroad or the Union. We have already seen that the Railway Labor Act is not a Fair Employment Practices Act. Under it a railroad is not prohibited from discriminating against negroes in their original hiring or in their treatment after hiring if it wishes to do so. The freedom which a railroad enjoys in the hiring of employees under the Act cannot be taken from the railroad by reason of the attitude of the collective bargaining agent. The right of the railroad to refuse entirely to hire negro employees or to assign them to less desirable classes of services when they are hired is not contingent upon the approval or disapproval of the collective bargain agent. Therefore, the fact that a collective bargaining agreement between a collective bargaining agent and railroad recognizes the right of the railroad to indulge in a discriminatory practice does not make the conduct of the railroad unlawful. Anything which a railroad has the power to do under the Act alone, it has the power to do even though the bargaining agent agrees to it. The *Tunstall* and *Steele* cases do not hold otherwise. They do not hold that a railroad has any obligation under the Railway Labor Act to refrain from racial discrimination. They merely define the rights and obligations of a collective bargaining agent under the Railway Labor Act and further hold as a matter of contract law that a railroad cannot enjoy the benefits of or be bound by an agreement between

the railroad and a collective bargaining agent which the collective bargaining agent is prohibited from making.

On superficial consideration it may appear that even though such an agreement would not be prohibited to a railroad, it would be one which it would be unlawful for the collective bargaining agent to make. However, we do not think such is the case. The *Tunstall* and *Steele* cases did not so hold and the policy of the Railway Labor Act does not require such a result. The Railway Labor Act encourages collective bargaining, and as we have seen, requires the bargaining parties to reduce to writing the matters upon which they have agreed. In such a legal environment a railroad and a collective bargaining agent reach an agreement on the wages, working conditions, and seniority rules applicable to a craft, except that the railroad is unwilling to agree to employ negroes in certain work classifications within the craft. The railroad assumes this position because of reasons which it considers entirely valid and for the good of its service. Under the Act the railroad would have a legal right to assume such an attitude. Under such circumstances, it would not be possible to incorporate in the collective bargaining agreement the seniority rules applicable to the different work classifications without giving recognition to the fact that in certain classifications negroes could acquire seniority and in others that they could not. If it is unlawful for the collective bargaining agent to make such an agreement recognizing the position which the railroad insists upon assuming, the purpose of the Act to encourage collective agreements is frustrated and negro members of the craft are not benefited because the railroad remains free to continue its practice of segregation. We do not think the policy of the Act makes it unlawful for the collective bar-

gaining agent to avoid such a deadlock by recognizing in the agreement the right which the railroad has under the Act to retain freedom in its hiring policies. Again we repeat that no such agreement as we have been discussing has been made by the Railroad and Union in this case, in spite of the fact that they were free to do so under the law.

The rule announced in the *Tunstall* and *Steele* cases must be determined in the light of the factual situation there existing. When they are read in this light, we do not think they declare it unlawful for a collective bargaining agent to make an agreement with a railroad which recognizes employment practices which a railroad has a right to indulge in under the law, so long as the bargaining agent does not make an agreement which is *destructive* of *existing rights* of the negroes in the craft. We do not mean to say that the bargaining agent should not bargain for racial equality, but we do say that it is not unlawful for the agent to be unsuccessful in changing the discriminatory practices which a railroad may desire to continue.

It appears in the *Tunstall* case (as reported when considered on the merits in 163 F. 2d 289) that the railroad there involved had a practice not to promote negro firemen to engineer status. This practice which was recognized must have been recognized in the collective bargaining agreements under which white and negro firemen acquired seniority. Otherwise, their relative rights to promotion could not have been determined. The situation as to negro firemen under the existing seniority agreement was described as follows at page 291:

> "No railway company of the United States has ever employed a Negro as a locomotive engineer and the Negro firemen are recognized as non-promotable to that position. Other firemen, if they possess the

requisite mental and physical qualifications, are given opportunity to stand examinations for promotion to engineer, but not Negro firemen; and, because they are not promoted, Negroes serve for long periods as firemen and the seniority thus acquired enables them to obtain some of the best paid and most desirable runs in the company's service."

The bargaining agent succeeded in obtaining a new agreement from the railroad there involved that all new runs and vacancies would be filled by promotable firemen. As a result of this provision, negro firemen were deprived of desirable runs which they would have been entitled to by seniority acquired under the former agreement which had to be changed by the new agreement. The Court said:

"The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold."

The Court did not declare unlawful the practice of non-promotability of negro firemen, but it enjoined the operation of the new agreement which had destroyed their existing seniority rights. The result of the judgment was to restore to effectiveness the earlier agreement which

undoubtedly recognized the discriminatory practice of refusing to promote negro firemen to the status of engineers.

The verbal understanding which Appellant Hayes alleges exists between Railroad and Union here, but of which there is no evidence in the Record, is similar to the agreement which was restored to effectiveness by the decision in the *Tunstall* case. Although we deny that such an understanding exists, we submit that it would not be unlawful for either Union or Railroad to make it if they chose to. That fact is an added reason why the District Court did not abuse its discretion in refusing leave to file the amended complaint.

No Justiciable Controversy.

The final and conclusive reason why the District Court property dismissed the complaint and refused leave to file the amended complaint is that neither complaint presented a justiciable controversy with respect to which the Court had power to grant relief. The plaintiffs are not seeking the restoration of previously existing seniority rights which have been taken from them by an unlawful agreement, and which rights could be restored by the simple process of invalidating the unlawful agreement, if one existed. A judgment which would enjoin the Union from "conniving" with the Railroad as alleged in the original complaint or enjoin the operation of the verbal understanding alleged in the proposed amended complaint, would be futile and would not afford the plaintiffs the relief they seek. Such a judgment would not prevent the Railroad,

if it had been discriminating against the plaintiffs, from continuing such discrimination. In order to afford the plaintiff the relief which they seek for the future and the damages which they seek for past alleged wrongs, the Court would be required to fix a seniority date for each of them in a higher group, such as Group A, at some time earlier than the date therein that each now possesses. It is quite apparent that the seniority dates which they ask to have established for application in Group A are the seniority dates which each acquired by actual service in Group B. Such a judgment would adversely affect the seniority rights of white cooks and other colored cooks who hold older seniority rights in Group A than the plaintiffs. Such a reshuffling of the seniority rights of the entire craft would not arise from any contract between the Railroad and its employees but only as the result of legal compulsion. Wherein is found the authority of a Court to make such a decree? A decree of such a character would find no support in the Railway Labor Act and would be contrary to all recognized legal principles. Such a decree would in effect be a rewriting of the agreement between the Railroad and Union and would abolish the group seniority system provided for therein. That this is what the plaintiffs seek is apparent from the prayers in both complaints and from the written demands which Appellant Hayes has made upon the Chairman of the Union for abolition of group seniority.

Under the Railway Labor Act the majority of a craft are entitled to select the exclusive bargaining agent for

the craft and the membership of the craft is bound by the agreements made on their behalf by their bargaining agent. There is no provision in the Act under which a minority group in a craft can compel, either by administrative or Court proceeding, a railroad and a collective bargaining agent to make a contract containing prescribed terms. The Act simply does not provide machinery to accomplish any such result. A suit in Federal Court to accomplish such a result presents no justiciable controversy of which the Court has jurisdiction.

B. of R. T. v. T. & P. Ry. Co. (5th C. C. A.), 159 F. 2d 822;

Division 525, O R. C. v. Gorman (8th C. C. A.), 133 F. 2d 273;

Harris v. Missouri Pacific R. R. Co., 1 Fed. Supp. 946.

While a Court can strike down illegal agreements and enforce and interpret contracts, it cannot make a new contract for the parties.

Shipley v. Pittsburgh & L E R Co. (D. C., W. D., Penn., 1949), 83 Fed. Supp. 722.

The only way in which the plaintiffs can appropriately seek the abolition of the group senority system is through the collective bargaining process because in the absence of unlawful discrimination by the collective bargaining agent, a Court will not disturb the agreement of the employer and authorized bargaining agent.

Langhurst v. Pittsburgh & L E R Co. (Penna.), 17 Labor Cases, par. 65,314.

Conclusion.

We respectfully submit that the District Court did not err in dismissing the complaint or in refusing leave to file the amended complaint.

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